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Supreme Court, U.S.
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Nº. 98 463

In The
Supreme Court of The United States
October Term 1997

YVONNE TSE et al.,
Petitioners,

v.

THE MIRAGE CASINO-HOTEL,
Respondent.

Petition For A Writ Of Certiorari
To The United States Court of
Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

MICHAEL S. YU*
Law Office of Michael S. Yu
2 East Valley Boulevard
Suite 270
Alhambra, California 91801
(626) 289-2833

Attorney for Petitioners
**Counsel of Record*

APPELLATE ADVANTAGE
4264 N. OAK TRAFFICWAY◆KANSAS CITY, MO 64116◆816-453-2424

28 pp

QUESTION PRESENTED

1. Whether granting Summary Judgement was proper under Federal Rules of Civil Procedure 56, 28 U.S.C.A. depriving petitioners/plaintiffs of a factfinder jury decision where genuine issues of material facts existed when both parties have presented facts which are capable of different ultimate inferences and conclusions, when viewed in their most favorable light for opposing party?

LIST OF PARTIES

Petitioners herein are:

YVONNE TSE, TIMOTHY TSE, a minor, CYNTHIA TSE, a minor and CHRISTINA TSE, a minor.

Respondent herein is:

THE MIRAGE CASINO-HOTEL, a Nevada Corporation DBA THE MIRAGE.

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Petitioners, Yvonne Tse, Timothy Tse, a minor, Cynthia Tse, a minor, and Christina Tse, a minor, respectfully petition for a writ of certiorari to review the judgement of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The original opinion of the court of appeals (Apdx. B) of May 21, 1998 is not reported for publication. The district court's order of April 17, 1997 granting the summary judgment for defendants (Apdx. C) is unreported.

JURISDICTION

The court of appeals issued a non-published decision (Apdx.B). Petitioners timely sought rehearing. The court of appeals rendered its Order denying the petition for rehearing on June 15, 1998 (Apdx. A). This Court has jurisdiction under 28 U.S.C. section 1254.

STATUTORY PROVISION INVOLVED

The underlying action was based upon a wrongful death action based upon diversity jurisdiction. The proper application of Federal Rules of Civil Procedure rule 56, 28 U.S.C.A. (Apdx. D) is in issue.

STATEMENT OF THE CASE

It is undisputed that on October 16. 1993, Dr. Tse was found dead at the northeast corner of the theater roof of the Mirage shortly after 11:10 a.m. after apparently coming off the south wing roof. (falling more than 20 stories) Prior to his fall, Dr. Tse was last observed gambling in The Mirage Casino.

Petitioners/plaintiffs produced disputed expert medical testimony of Dr. Eckert supportive of Dr. Tse's injuries as " masquerading a murder " and not suicide.

A dispute exists as to what inferences may be drawn from the of undisputed facts found after his death. From these facts one can deduct foul play resulting in murder involving Mirage's negligence (proffered by petitioner/plaintiff) or suicide. (proffered by the respondent/defendant)

Both parties agree that if a genuine issue of material fact as to the cause of Dr. Tse's death by a manner other than suicide exists, then summary judgement should be denied.

Lets review some of the facts:

The Casino video's for the gaming area, doors to the stairwells, as well as security monitoring reports for the south wing tower are missing and

not produced. (Suggestive of cover up, i.e., improper conduct by The Mirage.)

There were slash wounds to both of Dr. Tse's wrists

and throat areas coupled with the finding of broken glass in the center core stairwell between the 28th and 29th floors. Also, a belt was found fastened to the stairs. (There is no direct evidence to indicate whether Dr. Tse or another assisted in inflicting the cuts and/or a hanging.) The photographs reflect gashes which would cause a continued loss of blood.

However, evidence of Defendant's acting shift manager while performing defendant's own investigation found

(i) no blood trail exiting the center stairwell;

(ii) no blood markings on doors leaving the center stairwell;

(iii) no blood trail down the entire hallway of a wing from one end to another;

(iv) no blood markings at the entry of the south wing stairwell;

(v) no blood leading to the hatch gaining access to the roof;

(vi) no blood trail on the roof leading to the 4 1/2 foot parapet surrounding the roof where it is believed Dr. Tse had fallen from. (This is suggestive of foul play because of the nature of the slashed wrists and throat areas would leave blood, none was found, and no cloth, rug, and/or plastic items used to to contain the blood spillage was found on the roof and/or in the areas indicated. If Dr. Tse had used such items they would have been found, unless another or others removed same.)

Further, Respondent's/defendant's acting manager found that there was no evidence of Dr. Tse entering the

stairwell below the 27th floor and to go above the 24th floor one needs a special access key. (Suggestive of Mirage involvement)

Further, Respondent's/defendant's acting manager found automatic locking security doors operational and no evidence of blocking, i.e., a Mirage key needed for re-entry. (Suggestive of Mirage involvement because Dr. Tse who was cut and bleeding gained access without any evidence of any keys found or blood left on doors and/or related items.)

The hatch, although normally locked, which was used to gain access via a ladder, was not. The ladder normally not there, was. (Suggestive of Mirage involvement in placing ladder and unlocking and/or leaving unlocked the access hatch.)

The 4 1/2 foot tall parapet provided an obstacle to a 5 1/2 foot tall man in terms of jumping over it and making a 30-40 foot jump outward. (Suggestive of assistance with force by another.)

Evidence showed that alleged eye witnesses were not credible, i.e., not able to see what was claimed because of positioning and/or the 4 1/2 foot parapet surrounding the wall made it impossible for those on the ground to see activities on the roof prior to Dr. Tse coming off.

Evidence regarding Dr. Tse's behavior was disputed as not suggestive of suicide but merely bad judgment and

manners.

Petitioners/plaintiffs filed their wrongful death action on October 12, 1995. Respondent/defendant answered on November 13, 1995. Discovery ensued.

On August 19, 1996. Respondent/defendant filed its motion for summary judgement pursuant to Rule 56. It was opposed. A report and Recommendation of United States Magistrate Judge was entered on March 14, 1997 to which petitioners/plaintiffs objected.

On April 17, 1997, the district court granted the summary judgement motion (Apdx. C) holding that

> " ...Plaintiffs have insufficient evidence that decedent did not cause his own death." Petitioners/plaintiffs appealed.

The Ninth Circuit Court of Appeals, on May 21, 1998 affirmed based upon **Anderson v. Liberty Lobby, Inc.**, 477 U.S. 242, 248 (1986). (Apdx. B) In doing so, the court of appeals, not unlike the district, ruled on the credibility of certain witnesses, weighed evidence and made and/or failed to make reasonable inferences which raised triable issues of fact which should be within the exclusive purview of the jury. Thus, depriving petitioners/plaintiffs of their day in court.

REASONS FOR GRANTING THE PETITION

1. The Decision Below Concerning Guidelines In Ruling On Summary Judgement Motions With Mostly Circumstantial Evidence Capable of Different Inferences/Interpretation Raises A Significant and Recurring Issue Which Needs Clarification and Uniformity Among The Circuit Courts of Appeals and Is Ripe For Review.

In formulating its decisions, the district (Apdx. C)and ninth circuit (Apdx. B), failed to properly consider the " undisputed " facts capable of favorable inference mandating denial of the summary judgement motion. The decision simply ignores this and is in direct conflict with other decisions of the court.

The court must view the evidence and inferences in the light most favorable to the non-moving party. See; **Jewel Co., Inc. v. Payless Drug Stores Northwest, Inc., 741 F.2d 1555, 1559 (9th Cir. 1984).**

The opposing party is entitled to have his version of matters in dispute and all internal conflicts resolved in their favor and to be given the benefit of all favorable legal theories invoked by the evidence as considered. See; **Ross v. Communications Satellite Corp., 759 F.2d 355 (C.A. 1985).**

The evidence presented by the opposing party must be

taken as true. See; **Tirona v. State Farm Mut. Auto. Ins. Co. (D. Hawaii 1993)**

All conflicts and ambiguities must be weighed in the favor of the non-moving party and is entitled to have its affidavits generously construed. See; **Janneh v. Regency Hotel, Binghamton, 870 F.Supp. 37 (N.D.N.Y. 1994)** and **Richardson v. Kraft-Holleb Food Service, Inc., a Divison of Phillip Morris, Inc., 753 F.Supp. 233, 235 (N.D.Ill. 1990)**

It appears that the above principals were not applied properly by the courts and are inconsistent with the application of the principals of **Anderson v. Liberty Lobby, Inc., infra**.

2. The Decision Below, If Not Reversed, Will Result In A Gross Miscarriage Of Justice Through Improper Application Of The Law To The Facts At Hand.

The petitioners/plaintiffs a widow and her three children have been denied reasonable compensation for the death of their father and/or husband "at the hands of" and/or through the negligence of respondent/defendant The Mirage because of improper application of the law regarding a Rule 56 (Apdx. D) summary judgement motion constituting reversible error and necessitating the vacating of the judgement.

Justice will be served by allowing a day in court with

a jury trial so that multiple peers of the community can decide what the weight, credibility and believability are to be given the evidence while deciding the reasonable interpretation and/or inferences from all the evidence and expert opinions presented.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgement and opinion of the Ninth Circuit.

Dated: Sept.14, 1998

Respectfully Submitted,

MICHAEL S. YU *
Law Offices of Michael S. Yu
2 E. Valley Blvd.
Suite 270
Alhambra, California 91801
Office: (626) 289-2833
Fax: (626) 289-2978

* *Counsel of Record*

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

YVONNE TES; TIMOTHY TSE, a minor; CYNTHIA TSE, a minor; and CHRISTINA TSE, a minor, Plaintiffs-Appellants,	)	Nos. 97-15990 97-15998
v.	)	D. C. No. CV-S-95-00977-DWH
THE MIRAGE CASINO-HOTEL, a Nevada Corporation DBA The Mirage; Does and Roes, et al., Defendant-Appellee.	)	ORDER

Before: GOODWIN, PREGERSON and FERGUSON
Circuit Judges.

The appellant's petition for rehearing is DENIED.

FILED: June 15, 1998

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

YVONNE TES; TIMOTHY TSE, a minor; CYNTHIA TSE, a minor; and CHRISTINA TSE, a minor, Plaintiffs-Appellants,	)	Nos. 97-15990 97-15998
	)	D. C. No. CV-S-95-00977-DWH
v.	)	
THE MIRAGE CASINO-HOTEL, a Nevada Corporation DBA The Mirage; Does and Roes, et al., Defendant-Appellee.	)	MEMORANDUM*

Appeal from the United States District Court
for the District of Nevada
David Warner Hagen, District Judge, Presiding

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

Argued and Sumitted May 12, 1998
San Francisco, California

Before: GOODWIN. PREGERSON and FERGUSON
Circuit Judges.

Yvonne Tse and her minor children appeal form the summary judgment in favor of the Mirage Casino-Hotel (the "Mirage") on her action for damages for the wrongful death of her husband. We affirm. The appeal asserts that her proffered evidence raised a genuine issue of fact: whether hr husband ("Dr. Tse") committed suicide or was murdered. She also asserts that the district court erred in denying her motion for leave to amend her complaint. The Mirage seeks sanctions and attorney fees on the grounds that Tse's appeal is frivolous and her counsel violated the Federal Rules of Appellate Procedure.

Viewing the record in the light most favorable to Tse, we conclude that she has failed to show a genuine issue of material fact. Based upon the evidence, a reasonable jury could not find that Dr. Tse was murdered. Accordingly, under Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986), summary judgment was proper. Because we conclude that summary judgment was proper, we also find that the district court did not abuse its discretion in denying the motion for leave to amend the complaint, as any amendment would have been futile.

The Mirage has asked for sanctions pursuant to Circuit

Rule 30-2 for including materials that are irrelevant or not part of the district court record. It has also asked this court to order Tse to pay its attorney fees for filing a frivolous appeal.

Because it does not appear that Tse's counsel included the materials to gain a tactical advantage, we decline to impose sanctions. See Kirshner v. Uniden Corp. of America, 842 F.2d 1074, 1083 (9th Cir. 1998). And while Tse does not have a triable case, her appeal was not frivolous. Cf. Kalombo v. Hughes Market, Inc., 886 F.2d 258, 260 (9th Cir. 1989) (appeal frivolous when in the face of clear contrary Supreme Court precedent).

AFFIRMED. MOTION FOR ATTORNEY FEES AND SANCTION DENIED.

FILED: May 21, 1998

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF NEVADA

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

YVONNE TES; TIMOTHY TSE, a minor; CYNTHIA TSE, a minor; and CHRISTINA TSE, a minor, Plaintiffs,	)	
v.	)	CV-S-95-00977-DWH
THE MIRAGE CASINO-HOTEL, a Nevada Corporation DBA The Mirage; Does and Roes 1 through 20, inclusive, Defendants.	)	MEMORANDUM DECISION AND ORDER

Before the court are plaintiffs' objections (#60) to the magistrate judge's Report and Recommendation (#59) on defendant's Motion for Summary Judgment (#37). For the reasons set forth below, the court adopts the magistrate judge's recommendation (#59) to grant the motion in favor of defendant.

Plaintiff's Objections to the Magistrate Judge's Report and Recommendation

Any party may object to a magistrate judge's case-dispositive proposed order, findings, or recommendations. 28 U.S. C. 636(b) (1) (B); F.R.C.P. 72(b); L.R. 510-2. The district court must make a *de novo* determination of those portions of the magistrate judge's report to which objection is made and may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. 28 U.S.C. 636(b) 1.

The magistrate judge recommended granting defendant's motion for summary judgment on the grounds that plaintiffs failed to submit sufficient evidence t support their claims. Plaintiffs object to the magistrate judge's ruling excluding Dr. Eckert's report for defect in authenticity, and argue that the report, if considered, is sufficient evidence to survive summary judgment. Plaintiffs further object to the magistrate's order denying leave to amend the complaint.

Discussion

Upon review of the record, the court agrees with the magistrate judge that plaintiffs have insufficient evidence to go forward on any of their theories. Even assuming, *arguendo*, Dr. Eckert's report was properly authenticated, as discussed herein, it creates no genuine issue of material fact as to the cause of decedent's death. Without a genuine issue as to the cause of decedent's death, the court is left with the unrebutted presumption of death by suicide created by the coroner's report and corroborated by defendant's witnesses. *See* N.R.S. 440.60. Defendant has argued, and plaintiff apparently concedes, that suicide is an intervening cause of death which

breaks the line of causation from an allegedly wrongful act to the death relieving defendant of liability. *See Krieg v. Massey*, 239 Mont. 469 (1989), citing 41 ALR 4th, 353 and Prosser and Keeton on Torts, §44 at 280-81 (4th ed. 1971). No argument has been made that an exception to this rule applies here. Therefore, because plaintiffs have insufficient evidence that decedent did not cause his own death, plaintiffs have no damages caused by defendant and each of their claims falls of its own accord.

Summary Judgment

Federal Rule of Civil Procedure 56 allows the court to dispose of a case on a motion for summary judgment if it finds there is no genuine issue as to any material fact and the moving part is entitled to judgment as a matter of law. "The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor[1]." *Anderson v. Liberty*

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[1]Plaintiffs misread this rule. Their contention that "[t]he court must accept as true that Dr. Tse was not alone in the center core stairwell. That another person placed the leather belt around the step in the center core stairwell. The lacerations to Dr. Tse's writs [sic] were inflicted by another in an attempt to masquerade a murder. That Dr. Tse fought with his attackers, resulting in defensive assaultive injuries. That Dr. Tse was beaten by his assailants on the flanks. That a person with a key, by clear inference an employee of the defendant Mirage, was in the center core stairwell and opened the door of the center core stairwell to let himself, Dr. Tse and probably others out of the center of the South wing and into the South wing stairwell. That a ladder was placed to the hatch by these third persons and the lock on the hatch leading to the roof of the South wing stairwell was open [sic] by the person with a key, by clear inference

Lobby, Inc., 447 U.S. 242, 255 (1986). However, when a motion for summary judgment is properly made and supported, an adverse party may not rest upon mere allegations; the adverse party must make an affirmative showing on all matters placed in issue by the motion as to which it has the burden of proof at trial. *See Celotex. Corp. V. Catrett,* 477 U.S. 317 (1986), FRCP 56 (e).

To survive summary judgment, plaintiffs may not rely on their pleadings but must put forth sufficient specific factual evidence for a reasonable jury to find in their favor. FRCP 56(e). The court need not address whether the magistrate judge erred in excluding Dr. Eckert's report because even when that report and the later-filed declaration is reviewed with the rest of the record, the court reaches the same result as did the magistrate judge; plaintiffs have not shown there is a genuine issue of material fact for trial.

Dr. Eckert's Report Insufficient to Raise a Genuine Issue of Material Fact

The court has reviewed Dr. Eckert's report and the Eckert declaration filed with plaintiffs' declaration (#61) in

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an employee of the defendant, Mirage. Dr. Tse was made to go up on the South wing stairwell roof where his jacket (which was inside out), ring, tie and chips were left" is simply an incorrect application of the law. This court reads *Anderson's* mandate to construe facts and draw all justifiable inferences in favor of the nonmoving party *in pari materia* with the mere scintilla rule enunciated in that case. Justifiable inferences are those supported by more that a mere scintilla of evidence.

support of objections. No foundation has been laid for Dr. Eckert's conclusions. He opines that decedent Paul Tse did not commit suicide. As support for this conclusion, he first notes that the cuts to decedent's wrists, neck and chest were insufficient to cause his death; he further observes that in light of decedent's medical training, it may be inferred that decedent had sufficient knowledge to render cuts to the wrist neck and chest fatal if he so desired. This point proves nothing. Neither party has asserted decedent's death was caused by those injuries. The parties do differ on the significance of those injuries; defendant argues they are evidence of decedent's suicidal state of mind; plaintiffs argue they show decedent met with foul play. However, Dr. Eckert's opinion that the injuries are seen "in masquerading a murder" is without foundation[2]. Therefore, that opinion is insufficient to create a genuine issue of material fact as to the cause of decedent's death.

Next, Dr. Eckert opines that decedent's forehead injury and injuries over the liver and spleen were caused by blunt injury trauma. This point has no tendency to prove any

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[2]Eckert avers that "[t]he basis for the opinions was the result of performing the autopsy, advising and reviewing the photographs taken on the scene and at the hotel stairways and roof of the Mirage Hotel, the depositions by law enforcement and Dr. Green of the coroner's office, discussion with nationally known forensic pathologists in major cities in the United States and Hong Kong, and my 38 years of experience in forensic pathology." This statement does not provide sufficient specific foundational support for the conclusions drawn by Dr. Eckert and discussed herein.

material fact. The court finds it significant that Dr. Eckert does not explain why the blunt trauma could not have been sustained during or incident to decedent's fall from the roof. In fact, Dr. Eckert does not state that the injuries could not have been so sustained. Dr. Eckert then suggests that bilateral flank injuries were sustained antemortem. Again, this point has no evident tendency to prove any material fact at issue. Dr. Eckert does not explain why these injuries could not have been sustained during or incident to decedent's fall from the roof, and, significantly, he does not opine that they could not have been so sustained. Next, Dr. Eckert opines that injuries to decedent's right and index fingers were blunt trauma injuries not due to the fall. No foundation is provided for this conclusion, and even if it is true, Dr. Eckert provides no reason to conclude decedent did not commit suicide after these injuries were sustained.

Even if the court accepts plaintiffs' expert's opinions, those opinions would be no more than a scintilla of evidence to support plaintiffs' murder theory. *See Matsushita Elec. Indus. Co. V. Zenith Radio Corp.*, 475 U.S. 574 (1986) ("[O]pponent must do more than simply show that there is some metaphysical doubt as to the material facts...Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial'"). Plaintiffs have come forward with no percipient witnesses that saw any other person on the roof or in the stairwells with decedent. To the contrary, those eyewitnesses who saw decedent on the roof stated they did not see any

other persons on the roof with him. Plaintiffs have no evidence tending to show any person threatened decedent with violence or had any motive to kill him. As pointed out by defendant, even assuming, *arguendo*, decedent sustained "assaultive injuries", there is no evidence those injuries took place at the Mirage or that decedent did not commit suicide sometime thereafter. The overwhelming weight of the evidence tends to establish decedent's death was a suicide. Plaintiffs lack sufficient evidence to rebut the coroner's conclusion on cause of death as corroborated by eyewitnesses and additional circumstantial evidence. The remote possibility that decedent was murdered, without specific factual support, is insufficient to overcome defendant's properly supported motion for summary judgment. FRCP 56(c). Therefore, to the extent plaintiffs' object to the magistrate judge's recommendation that defendant's motion for summary judgment b granted, plaintiffs' objections are hereby overruled and defendant's motion for summary judgment is hereby granted. Plaintiff's objections to the magistrate judge's rulings on the admissibility of Dr. Eckert's report and the striking of Eckert's declaration are overruled as moot.

Due to the courts ruling on defendants' motion for summary judgment, it appears that plaintiffs' proposed amendments to the complaint would have been futile. Therefore, to the extent plaintiff objects to the magistrate judge's ruling on the proposed amendment, that objection is overruled as moot.

IT IS ORDERED that plaintiff's objections to the magistrate judge's report and recommendation are hereby OVERRULED. With the exceptions and clarifications noted in this memorandum decision and order, the court adopts the magistrate judge's report and recommendation and hereby GRANTS the defendant's Motion for Summary Judgment (#37).

IT IS SO ORDERED.

DATED: This */s/ 14th* day of April 1997

/s/
UNITED STATES DISTRICT JUDGE1

APPENDIX D

FEDERAL RULES OF CIVIL PROCEDURE § 56

USCA - FRCP Rule 56

(c) Motion and proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.